1951

Ebba E. Finlayson v. Kenneth Brady and Donald B. Milne : Brief of Respondent

Utah Supreme Court

Victor G. Sagers; Attorney for Defendants and Respondents;

7713

In the Supreme Court
of the State of Utah

EBBA E. FINLAYSON and ALLAN FINLAYSON,
Plaintiffs and Appellants

— vs. —

KENNETH BRADY and DONALD B. MILNE, partners doing business as Brady-Milne Appliance Company.
Defendants and Respondents

No. 7713

BRIEF OF RESPONDENT

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Attorney for Defendants and Respondents

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BRIEF OF RESPONDENT

NATURE OF THE CASE

The respondents agree with the appellants' statement of the Nature of the Case in most part except, wherein appellants state that the respondents brought a separate suit upon the same theory as appellants (appellants' brief page 4) and contend that the basis of the second suit is as pointed out in respondents Answer and Counterclaim (R. 12).

STATEMENT OF FACTS

The statement of facts as made by the appellants is certainly stated most favorable to the appellants and in most particulars is argumentative, misconceives the pleadings, is based upon suppositions, assumptions, and is sought to draw unfair inferences. The evidence adduced at the trial certainly does not support the facts as stated by the appellants, therefore, it becomes inherent that the respondents restate them in order that they may be correctly viewed.

Since the points argued by the appellant primarily deal with the sufficiency of the evidence, and since answering them requires a complete review of the evidence, the respondents only wish to make a brief statement of the facts at this time.

In the summer of 1948 the appellants were constructing an apartment building consisting of three four-room apartments and one three-room apartment situated at 466 Lindell Lane, Sandy, Utah (R. 115, 239). Each apartment was to be and is heated with a separate gas space heater (R. 116, 238, Exhibit B). Apartment No. 1 was located on the ground floor, west side of the building, apartment No. 2 on the ground floor east, apartment No. 3 in the basement under No. 2, and apartment No. 4 was likewise in the basement under No. 1 (R. 144, 145). All chimneys, flues, pipes, lead-ins, etc., was constructed solely by the appellants and not the respondents. Two separate flue chimneys were constructed by Mr. Finlayson in the building, one on the east side to provide

vents for apartments No. 2 and 3 and the other on the West side to vent the heating units in apartments No. 1 and 4 (R. 121, 122, 123, 144, 145) both of which are inadequate (R. 283).

The appellants in their brief, page No. 4, contend that Mr. Finlayson had known the respondents for many years and infer that due to this relationship unfair advantage had been taken of them. Such is not the case, as both of the respondents deny knowing Mr. Finlayson personally until the time of some business transactions several months prior to the case at bar (Exhibits 1, 6, 7).

In August 1948 Mr. Finlayson contacted Mr. Milne regarding the purchase of the merchandise in question (R. 238, 306). Mr. Finlayson represented to Mr. Milne, at this time, that he was securing bids for said merchandise and that he had already requested permission to go ahead for the gas (R. 154, 239) when actually he did not even make application for the gas until December 27, 1948, as is shown by a Mountain Fuel Supply Co. Official (R. 219, 220).

After inspecting the merchandise, at the respondents' Murray Store, the appellants purchased the merchandise shown in Exhibit B. The merchandise purchased consisted of 4 Servel Gas Refrigerators, 4 Harwick Gas Ranges, 1 Servel Water Heater, 3-50,000 BTU and 1-30,000 BTU Brilliant Fire Gas Space Heaters with a total purchase price of $1,675.00 (Exhibits B, 6, 7). All of the space heaters were at the time and still are

American Gas Association approved and listed, the standards set up for such approval being set by the American Standards Association (R. 218). The heaters in question were manufactured by the Ohio Manufacturing Company (R. 219, 263) which company has been in business some 105 years (R. 263). The appellants have made an issue of the fact that they did not get Crosley Space Heaters (R. 119, 129, 136, 141), yet the respondents have never carried such a brand heater (R. 250, 251, 284, 314) and in fact no such type heater even exists as is evidenced by two gas company officials and according to the American Gas Association Directory (R. 202, 218).

Mr. Finlayson indicated to Mr. Milne, at the time of purchase, that he desired to pay cash but wanted a couple of months to pay it in (R. 242, 243). Relying upon this and the fact that the respondents had had satisfactory business relations with the appellants several months previous to this (Exhibits 1, 6 & 7, R. 238) the respondents ordered some of the goods not on hand (R. 241) and set aside within a few weeks time as Mr. Finlayson's property the above items (Exhibit 6 & 7, R. 239, 246, 247, 285). During the course of business the respondents often sell merchandise the terms of payment for which is considered to be cash if paid within 60 or 90 days. However, in order to protect themselves they require the customer to sign a conditional sale contract ("Protective Contract") and do not date it at that time. Then if after the alloted time the customer can not meet the requirements for cash he is given credit for the pay-

ments made to date and a new contract is executed. Such is the case here (R. 242-243). On August 14, 1948, (R. 238) which is contrary to appellants' contention of December 6, 1948 (appellants' brief page 5, R. 118, 120, 145, 153) $50.00 was paid as a partial down payment (Exhibits 1 & 7) which is also contrary to Mr. Finlayson's testimony that he never made any such payment (R. 146) and the "protective contract" (Exhibit A) was executed. The respondents after being told at the time of the sale on August 14, 1948 (R. 238) that the appellants had applied for the gas (R. 239) when such was not the case (R. 219, 220), and having been disappointed on the promise of the appellants to pay cash within 90 days (R. 242, 243, 244, 248, 249 286, 307) as well as having the merchandise tied up in their warehouse earmarked for the respondents (R. 285, Exhibit 6), became apprehensive of the good faith of the appellants. Nevertheless, they leaned over backwards to try and expedite the installation of the gas (R. 239, 240), continued to listen to the tales of woe of the appellants (R. 242, 243, 248, 249, 286, 307) in respect to the payments to be made, and very foolishly installed the merchandise on December 31, 1948 (R. 127, 253) in order to try and get the payments as promised.

No further payments were made on this agreement until January 17, 1949 (Exhibits 1 & 7) some 156 days after the first payment and then only $150.00 (Exhibits C, 1 & 7) was paid which would still make the down payment short $140.00 of the $340.00 required as evidenced by Exhibit A and B in case the cash terms could

not be met. The cash terms were definitely not met and it took the respondents an additional 45 days more to get the appellants to sign the contract in question (Exhibit B) which would be a mere 66 days past the 90 days originally granted. Exhibit B was signed on March 3, 1949 in the appellants' home (R. 306) and superseded Exhibit A (R. 244) and was not signed three weeks after Exhibit A, or December 27, 1948, as contended by the appellants (appellants' brief page 5 and R. 120). At the time of signing Exhibit B the appellants paid the respondents $140.00 (Exhibits D, 1 & 7, R. 249, 307) which amount completed the $340.00 down payment, which is contrary to the appellants contention (appellants' brief page 5).

Sometime between the date of installation of the equipment (R. 238) and the making of the second contract (Exhibit B) the appellants painted their apartments Nos. 1 and 2 and spilled paint on both refrigerators (R. 242, 314) and as a result of such the respondents were forced to replace, at their own expense, said refrigerators or else not get paid for any of the merchandise (R. 241) and have not been able to sell one of them to date. Therefore, they are out the price of this refrigerator—$185.75 (Exhibits 6 & 7).

Two weeks after the valid contract (Exhibit B) was signed the respondents sold the contract to the Sandy City Bank with full recourse, March 16, 1949 to be exact (Exhibit 5) and the money receipted for on March 17, 1949 (Exhibits 1 & 7). Additional payments amounting

to $983.50 have been made on the contract (Exhibit 5, R. 22-25, 125) leaving a balance on the contract of $491.-75 (Exhibits 5 & 7, R. 22-25, 330) which is contrary to appellants' contention in appellants' brief page 6 wherein they claim that only $202.15 is due and in appellants' statement (R. 143) where he claims that only $201.00 is still due and owing. As a result of the appellants' habitual delinquency in the payments of the monthly installments to Sandy City Bank the respondents were forced on November 7, 1950 to repurchase the contract (Exhibits 5 & 7, R. 22-25).

The appellants contend that they refused to make any further payments due to defective heaters (appellants' brief page 7) but a careful analysis of Exhibit 5 shows that not one but every payment, from the time of the due date of the first installment until the present time, is delinquent and that at least 6 payments were not paid on time prior to the time the appellants mentioned that the heaters were turned on in September 1949 (appellants' brief page 6, R. 128).

The respondents, as they normally do, agreed to make only a normal hook-up installation of the equipment (R. 10, 240, 260)—i.e.—hook-up the appliances to whatever facilities that the purchaser has arranged and this they did. The respondents also agreed to guarantee, either expressly or impliedly, the heaters for one heating season only (R. 252, 260, 311, 316). At the time the pieces of equipment were installed the respondents informed the appellants that the provisions made by the

appellants were not adequate and that they would not pass inspection by the Gas Company but the appellants insisted that the connections be made to the existing facilities (R. 268, 272, 289, 290, 292) and the gas was inspected and turned on by the Gas Company officials (R. 211, 221, 289). As a result of the connections of the heaters to the Finlayson provided flues (R. 268) and in the position desired by the appellants it necessitated the respondents to install 3 additional L's on each heater (R. 272, 274) which in turn cut down the efficiency (R. 272, 275). The main chimneys as installed by Mr. Finlayson were not adequate to properly care for the BTU output of the equipment installed (R. 279, 380). The stoves and refrigerators are not vented at all, yet they put out approximately one-half the output of gases that each heater does (R. 279-280).

The appellants contend that the heaters leaked gas and were defective (appellants' brief pages 6-7). The respondents however, submit that the true facts are that such heaters were not defective, but if there was any gas leakage it was due to the faulty flues and the way the appellants insisted that the heaters be installed (R. 272, 278, 279, 280, 283, 284, 285, 311, 313) as well as to the other eight pieces of gas equipment casting fumes into the rooms because they were not vented at all (R. 278, 279, 280, 283). The appellants also contend (appellants' brief page 6) that the appellants lost $525.00 in rental due to the heaters. No evidence of any nature was adduced at the trial to show that the apartments were vacant due to the heaters, and quite to the contrary three

witnesses for the respondents, all of whom lived in the apartments during the period in question, stated that the heaters functioned properly and they moved because of the inconvenience of the location of the apartments, the size, and because the rentals were too high (R. 139, 294, 297, 299). A careful analysis of Exhibit 2, which is the official turn on and off, as well as meter readings of the gas company, will reveal that even if the apartments were empty due to the heaters (which they were not) under no circumstances could there have been a loss of $525.00 as charged but only $425.66, or approximately $100.00 less than that prayed for. (This will be treated more fully in respondents' argument No. 1).

At no time from the time of installation on December 31, 1948 (R. 127, 253) until November 1949 (R. 250, 253, 255, 258, 276, 302, 309, 311) did the appellants complain in respect to the heaters. In November 1949 the appellants dreamed up a new excuse for non-payment and notified the Sandy City Bank that the heaters leaked gas and they refused to make any further payments until the heaters were fixed. The bank in turn notified the respondents (Exhibit E, R. 309) and the respondents confident that the leakage, if any, was not due to the heaters but to the flues and inadequate venting (R. 278, 279, 280, 285, 302, 304), but being desirous of cooperating to the "N" degree foolishly extended the olive branch once more and agreed to take the heaters out and weld the collars on them, (R. 250, 253, 255, 258, 276, 297, 309, 311), although in all their six years experience (R. 277) and the installation of some 64 similar heaters (R. 283)

they had never had to do such. These heaters were only out about four hours (R. 220, 221, 277, 297, 310) which is contrary to the two or three weeks claimed by the appellants. No further complaints were made to the respondents, or the gas company, relative to the heaters, except, one in May 9, 1950 to light a pilot light, until approximately one year later—October 1950 (R. 191, 197, 250, 255, 258, 276, 309, 311) and at which time Mr. Brady again informed the appellants that the fault was not with the heaters but with the venting and flue installation by Mr. Finlayson. At the time of this complaint, which was only the second complaint from the time of installation, Mr. Brady stated that the heaters were out of warranty, as the guarantee only lasted one season (R. 252, 260, 311, 316), but if Mr. Finlayson would give Brady-Milne permission to raise the flues and would pay for it he thought such procedure would rectify the situation. Mr. Brady at this time, much to his surprise, learned that the appellants had sold the equipment and apartment house to Mr. and Mrs. Edwin Anderson on December 21, 1949 (R. 302, 303) which was in direct violation of paragraph 3 of the terms of the contract (Exhibit B). Mr. Brady immediately called Mrs. Anderson (R. 303, 304) and she requested him to raise the flues. The respondent went further however, and discussed the matter with the gas company and took the heaters out and up to the Gas Company's warehouse and had some scientific tests run on them. They were there but one afternoon (R. 213, 220, 221, 313) and were pronounced all right when returned. A close analysis of

Exhibit #3 will show that the first and only maintenance call made by the gas company between December 31, 1948 and September 1950, other than in October 1949 at the respondents' request, was not until May 9, 1950 and then it was only to light a pilot light on the heater in Apt. #2—Mr. Kenneth D. Hakanson. Therefore, the first heating season went along without event other than the four hours in October 1949 and the one service call to light the pilot light. The appellants' only witness during the first heating season (Mrs. Strebel, R. 186) even testified that no trouble existed during the first heating season, likewise, the new unauthorized owner testified to such (R. 302).

At no time since purchase until the present date has the appellants offered to return the heaters or asked to have them replaced (R. 254).

At the conclusion of the trial the court directed a verdict in favor of the defendants-respondents and against the plaintiffs-appellants and further directed that judgment be entered in the sum of $491.75 (the balance due on the contract—Exhibit B) in favor of the defendants-respondents, and for interest, costs, and attorney's fees.

RESPONDENTS' STATEMENT OF POINTS

POINT ONE

There is sufficient evidence to sustain the Court's findings and in the direction of a verdict in favor of

the defendants-respondents and against the plaintiffs-appellants (Reply to appellants' Point One).

POINT TWO

There is sufficient evidence to sustain the court's judgment and award of attorney's fees as the appellants had continuously breached the contract from the very beginning and in many respects (Reply to appellants' Point Two).

POINT THREE

The court below properly denied plaintiffs-appellants motion for a new trial (Reply to appellants' Point Three).

POINT FOUR

The appellants have compelled the respondents to defend this appeal, therefore, the court should award the respondents a reasonable attorney's fee and costs in compliance with Exhibit B, or else remand this case to the trial court for the trial court to award such.

ARGUMENT

POINT I

Passing now to the main issues involved which are breach of contract, loss of rental, and breach of warranty

(appellants' brief page 9). The respondents respectfully present the following evidence, direct testimony, and statements to show that there was no breach of contract on their part, but the breaches, and we say breaches, were on the part of the appellants; that there was no loss of rentals as a result of the heaters and even if there was a loss, regardless of the reason, it could not be nearly the amount as claimed by the appellants; that there was no breach of warranty on the part of the respondents, and even if there was such a breach, the appellants had estopped themselves from setting up this defense.

A good beginning point is the understanding in the minds of the respondents at the time the contract (Exhibit A & B) was made which is expressed best by the direct testimony of Mr. Milne:

MR. SAGERS:

"Q. At the time of the purchase or conversation relative to the purchase of this merchandise, what was said relative to the method of payment?

A. Mr. Finlayson wanted to pay cash if possible, but he wanted, oh, I think in the conversation maybe ninety days to pay that cash; and I took it for granted that the line would be installed very quickly, and we could install our merchandise. Of course, I agreed that we could probably have it installed by that time satisfactorily, and he could pay the cash. (R. 242, 243, 244).

* * *

Q. Now, what is the reason for no date on that contract (Exhibit A)?

A. Oftimes in our business dealings a person who wants to pay cash, if we agree orally that we will give them sixty or ninety days, we still have to have other protection, and so we ask our customer to sign the contract so that if we don't get the cash in the specified time, then the contract will protect us in the sale of the property, and I think that's what happened here.

* * *

Q. Well, in this particular case or a case similar to this, if the money was not paid within the sixty or ninety days agreed upon, then with the consent of the purchaser you would place the date in?

A. Yes.

Q. And then you would sell the contract in order to get your money?

A. Well, during this time he may have made half the total payment, and so at that time a new contract would be made up and sent in. That often times happens. If a customer thinks he can get it in ninety days and he can't, he is still given credit for the amount he has paid and the new contract made out. That's our procedure." (R. 243, 244).

Contrary to the appellants' contention (appellants' brief page 5, R. 118, 120, 145, 153) that the "protective contract" (Exhibit A) was signed on December 6, 1948 and that the valid contract (Exhibit B) was signed three weeks later—December 27, 1948, (R. 120) the respond-

ents submit that the "protective contract" was signed on August 14, 1948 (R. 238, 243, 306) and the valid contract was signed in the appellants' home on March 3, 1949 (R. 306) some 201 days after the initial down payment of $50.00 and at no time was any contract of any nature signed in December 1948. At the time of the consummation of Exhibit B the tentative contract (Exhibit A) became null and void (R. 244). The appellants contend that they have made payments of $290.00 for which they have not been given credit (R. 151 and appellants' brief page 5) and state that they made a lump sum cash payment of $340.00 (R. 121, 147). Mr. Finlayson testified that he did not know anything about the $50.00 cash down payment on August 14, 1948 (R. 146). It is hardly feasible that the respondents would give the appellants credit for this amount without receiving it from them. A search of appellants' complaint (R. 1-6) and counterclaim (R. 76-80) show that no recovery is sought for this so-called additional $290.00 (Exhibits C & D). Exhibits 1 & 7, which are the respondents official records, show that appellants were given proper credit for these two amounts. It will be noted that the appellants stipulated to and agreed at the time of the pretrial (R. 22-25) that the balance due was $491.75 and that only $983.50 over and above the $340.00 down payment had been made. This appellants confirmed in direct testimony (R. 125). To further refute that $340.00 was not paid in one sum (R. 259) we invite the court's attention to the respondents' testimony (R. 251, 254, 315) wherein they show that a contract is never used as a receipt. It is ridiculous

to assume that a person is going to sign a second contract without getting full credit and then wait two years to raise such a point as was done here. However, to dispell any misapprehension that may have arisen the respondents respectfully submit the true facts adduced at the trial:

At the time the "protective contract" (Exhibit A) was signed the respondents received $50.00 in cash (Exhibits 1 & 7) and were to receive the full balance of the contract within 90 days (R. 242, 243). The respondents not normally stocking gas refrigerators as required by the appellants purchased them especially for the appellants (R. 241). All the merchandise was set aside in the respondents' warehouse for the use and benefit of the appellants and were to be delivered when requested (R. 239, 246, 247, 285 and Exhibit 6). The respondents and their agents leaned backwards to try to cooperate with the appellants and even took the appellants to the Gas Company to see if they could expedite the installation of the gas line (R. 239, 240) even though the appellants had misrepresented the facts at the time they ordered the equipment by stating that they had already applied for the gas (R. 154, 239) when actually they never applied until December 1948 (R. 219, 220). All during the period from August 14, 1948, at the time the protective contract was signed, until March 3, 1949, the respondents tried in vain to obtain the purchase price in cash from the appellants as they had agreed to pay (R. 242, 243, 244, 248, 286, 307) but were unsuccessful

in their efforts. There was a period of some five months in which the respondents had only received $50.00 on the full purchase price (R. 248, 249, 307 and Exhibits 1 & 7) and even installed the merchandise on December 31, 1948 (R. 127, 253) with only this $50.00 payment having been made. After further efforts of trying to get the cash the appellants finally paid $150.00 on January 17, 1949 (Exhibits C, 1 & 7, R. 248, 249, 307) and $140.00 on March 3, 1949 (Exhibits D, 1 & 7, R. 248, 249, 307). These two amounts plus the $50.00 paid on August 14, 1948 completed the total down payment of $340.00 (Exhibits B, 1 & 7) which was so indicated on Exhibit B signed March 3, 1949 in the appellants' home. To further refute appellants' contention a close analysis of appellants' Exhibit A will show that $340.00 was not paid in cash at that time because if you take the total cash price of $1675.00 and add the time differential of $159.68 to it the total becomes $1,834.68 which is shown as the total time price, also, this contract is not complete as to date, due dates, amounts of monthly payments, etc., whereas Exhibit B the true contract is complete in all respect. Further evidence that Exhibit A is merely a "protective contract" and a contract is never considered a receipt is indicated by the record (R. 243, 244, 251, 254, 314).

The trial court only permitted the introduction of Exhibit A for the purpose of deciding whether the court would permit the appellants to amend the pretrial order (R. 127). The court stated as follows:

THE COURT:

> Well I am going to let it in at this time because I have got to determine whether or not I shall permit an amendment later, and for that purpose it will be received.

The trial court's answer to this is shown by the court's statement at the termination of the trial as follows: (R. 327, 328).

THE COURT:

> * * * The plaintiffs asked leave to amend this agreement and prove to you that $340.00 for which he had no receipt but which was recited in the contract was paid and then these $50.00, $150.00, and $140.00 items that make up the $340.-00 were separate items that he wanted credit for, and that just doesn't ring true to me. A man that pays $140.00 on March 3 and then enters into a contract sometime between then and March 7 and still takes the old $340.00 and doesn't claim anything in his contract when they enter $340.00, if he had paid $340.00 in cash before, he certainly would have said "Listen boy, let's up this price from $340.00 to include the additional $340.00 that I just got through paying you." He didn't do that, so I am not going to permit him to amend that. I don't think there is anything to it, so you won't have to bother about that.

To further substantiate the court's position and to show the absurbity of the contention we quote from the appellants' own testimony as follows: (R. 151, 152).

MR. SAGERS:

> "Q. Just didn't understand it. Yet you gave $290.00 without making a complaint for it,

and you had your cancelled checks, one of them dated January which would have cleared the bank and you have another which you gave just a couple of days before this is dated. How do you explain it? Are you in the habit of going and throwing away $290.-00 without getting credit for it?

A. Oh, no.

Therefore, we submit that the only payments made on either Exhibit A or B, and the record bears it out (Exhibit 1, R. 248, 249, 307) was the $50.00 on August 14, 1948, the $150.00 on January 17, 1949 and $140.00 on March 3, 1949.

The appellants in their statement of facts (appellants' brief page 5) and in their argument one (appellants' brief page 9 and 11) contend that the respondents breached the contract with the appellants by not installing heaters of a brand name of Crosley. At no time during the trial did the appellants produce any evidence other than Mr. Finlayson's (R. 119, 129, 136, 141) that such a type heater exists. However, the respondents through their direct testimony (R. 250, 251, 284, 314) show that they have never carried or even heard of such a heater. Further proof that no such heater exists is shown through the testimony of two Gas Company officials and the American Gas Association's directory (R. 202, 218).

The appellants in their complaint (R. 3) seek $326.-00 as the purchase price of the heaters whereas in appellants' brief page 14 the cost has gone up $10.00. They

also seek $577.00 (R. 3) as the amount of rental loss. The appellant states in direct examination that the heaters cost $336.00—3 at $89.00 and one at $69.00 which would make a total of $336.00 (R. 142) and also stated that the rental loss was $530.00 (R. 132) and $525.00 (R. 161 and appellants' brief page 6). It would appear from the record that the appellants are not at all certain what dates the tenants were there, when they moved, and how much rent was lost. No rent receipts were produced (R. 159) and the testimony by the appellants is certainly conflicting even as to the amount that was charged for rent. To further illustrate the confusion in the appellants' mind as to the loss of rental we respectfully call your attention to the record at pages 130, 131, 132, 158, 159, 160, 161 and 162).

The contract covered some 13 items of equipment and inasmuch as the appellants are seeking recovery for amounts far in excess of the actual cost of the heaters the respondents respectfully invite the court's attention to respondents' Exhibit 6 & 7 which set out the actual cost of each piece of equipment, a summary of which is as follows:

Date Sold	Ticket Number	Quan.	Description	Unit Price	Total	Tax	Grand Total
8-14-48	4827	1	Maytag Washer	$131.85	$131.85	$ 2.64	$ 134.49
8-16-48	4839	3	50,000 Brilliant Fire Space Heaters	54.20	162.60	3.25	165.85
8-23-48	4875	4	Apt. Hs. Ranges	86.40	345.60		
		1	45 Gal. Servel Water Heater	230.40	230.40	11.52	587.52

			Servel Apt.				
9- 3-48	4944	4	House Refrig.	185.75	743.00	14.86	757.86
			30,000 Brilliant Fire				
1- 7-49	5575	1*	Space Heater	49.95			
			Less 20%	10.00	39.95	.80	40.75
			Total				$1,686.47
5- 6-49	5915**		Less Credit Memo				11.47
			Net Amount				$1,675.00

Now segregating the heaters from the others you have

3	Heaters costing	$ 165.85
1	Heater costing	40.75
	Total cost of heaters	$ 206.60

From the above analysis it is very evident that the cost of the heaters can not possibly be more than $206.60 including sales tax which is approximately $120.00 less than that sought by appellants. We think this speaks for itself, of course using these so-called "defective heaters" for several years may have enhanced their value $120.00.

Inasmuch as there is so much discrepancy relative to the appellants' testimony as to when the apartments were vacant we deem it only fitting and proper that the complete analysis of the dates the gas was connected in each apartment should be made at this time. It is not conceivable that a party living in an apartment would have the gas turned on or off very many days before he

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* This heater was indavertently not written up at the time of the others but was set aside when the other heaters were.

** This credit memo not run thru the records until May 1949 but as both Exhibit A and B will show was taken into consideration in the calculations.

or she moved in or out of an apartment, therefore, the most reliable record would be the "turn on" and "off" and "meter reading" sheets of the gas company which is evidenced by Exhibit #2 (R. 202, 203, 204, 205, 206, 207). We wish to point out that the below listed analysis is a complete record up to the time of the trial which would include the period from June 1949 to April 1951, a period which by all means is most favorable to the appellants because it includes a considerable length of time past the warranty period of one heating season, nevertheless, we submit it for your consideration:

Apart. No. and Location	Name of Tenant	Date Connected	Date Discon.	Meter No.
Water Heater	Allan L. Finlayson	6-23-49	1-26-50	443-7388
Basement	Edwin Anderson	1-26-50	Present	
Apt. No. 1	D. A. Bruno	6-28-49	9-23-49	443-7295
West Side Up	Clarence Peterson	11-25-49	1-28-50	
	Keith M. Rice	1-28-50	8-11-50	
	George Haner	8-15-50	9- 5-50	
	Walter Seggerman	9- 5-50	Present	
Apt. No. 2	Douglas Steadman	6-23-49	10-12-49	419-560
East Side Up	Glenn E. Lloyd	11-15-49	1-18-50	
	Kenneth D. Hakanson	1-21-50	8-11-50	
	Benny Beckstead	8-21-50	Present	
			Changed	
		9- 7-50	Meters	444-1272
Apt. No. 3	A. M. Swenson	6-29-49	10- 4-49	443-7363
East Side Down	Peter G. Strebel	2- 7-50	Present	
Apt. No. 4	Jack C. Beck	6-23-49	10-24-49	443-7417
West Side	Iris C. Lees	11- 7-49	12-11-50	
Down	J. E. Green	1-23-51	Present	

From the above schedule it can be seen that apart-

ment No. 1 was empty from 10-1-49 through 11-24-49 and using the rent of $75.00 per month as stated by Mr. Finlayson (R. 130) the loss of rental would be $135.00. apartment No. 2 would have a loss of rental of $80.84 as it would be empty from 10-13-49 through 11-14-49 and apartment No. 3 being empty from 10-5-49 through 12-31-49 would have a loss of rental at $65.00 per month of $186.43; and apartment No. 4 with a rental of $55.00 and vacancy period from 10-25-49 through 11-6-49 would amount to $23.39 or a grand total of only $425.66 under the most favorable conditions to the appellants. Further analysis of these facts show that each amount alleged as shown by Mr. Finlayson's testimony (R. 130-132, 157-162 and appellants brief page 6) is very different from the above calculation. Taking the above figures, which are certainly the most favorable to the appellants, the loss of rental could not possibly be more than the above figure which is approximately $100.00 less than that claimed for by the appellants.

The testimony of Marie Haner who lived in apartment No. 1 (upstairs west) and who only paid $60.00 per month rental, shows very plainly that she did not have trouble with the heaters and did not move on account of them (R. 138, 139, 140):

MR. SAGERS:

"Q. And while you were there, did you ever smell any gas?

A. No, we didn't.

Q. Did you move on account of the gas?

A. We moved because we had four children, and we found a house that was larger, and it made more room for us with the house. It had nothing to do with the gas.

Q. How much rent did you pay at this time?

A. Sixty Dollars.

Q. Sixty dollars a month?

A. Yes."

Mrs. Seggerman who is a present tenant in apartment No. 1 stated that the heater exploded in apartment No. 4 (R. 181, 182) which testimony was stricken as hearsay but to show to your honorable body that this is unfounded we set forth direct testimony from Mrs. Iris Lees who lived in apartment No. 4 (basement west) for two heating seasons (R. 293, 294, 295):

MR. SAGERS:

"Q. Did you have occasion to live in the apartment house of Mr. Finlayson?

A. I did.

Q. In other words, that would be one complete heating season and part of another?

A. Yes.

Q. Now while you were living there, did you smell any unusual odors, or did you have any occasion to be fearful—well, just one question at a time. I'm sorry. Did you smell any odors?

A. Just from the hallways.

Q. You had no trouble with your heater with respect to odors?

A. No.

Q. Mrs. Lees, why did you move from the apartment house?

A. Well, one reason because it wasn't big enough for my husband and three children, and then I was expecting.

Q. You were not fearful of the heaters at all?

A. No."

MR. BAYLE:

"Q. I see; and at any time while you were there did the stove in your apartment blow up?

A. It made a noise, but what do you mean by blowing up?

Q. Was there any kind of an unusual explosion?

A. Well, no.

Q. Did you ever have any trouble with the heater at all?

A. What do you mean, trouble. What kind of trouble?

Q. Did you have any situation arise where it wasn't functioning normally?

A. No.

Q. Never had any difficulty?

A. No.

Q. Did you ever experience any physical effects from what you thought was gas?

A. No.

Q. Never had any headaches?

A. No."

The testimony of Mr. Glenn Earl Lloyd (R. 296, 297, 298) who occupied apartment No. 2 (upstairs east) for two months during the heaviest of the winter shows that the heater worked fine:

MR. SAGERS:

"Q. While you were there, did you smell any odors?

A. Not that I know of.

Q. Did you have the heaters on while you were there?

A. Yes sir.

Q. How did they work?

A. Worked fine.

Q. Did you ever have any trouble with them?

A. No sir.

Q. Was the gas company ever there at anytime in regards to the heaters?

A. The man there in the back come and removed the heater in November for a period of four hours(pointed to Mr. Haws).

Q. Four hours?

A. That was in my apartment. I don't know about the others.

Q. But it wasn't due to any function of the heater?

A. No. I didn't know what was the matter.

Q. Why did you move from there?

A. It was too high rent and far out, and my wife was expecting, and she had a nerve in her back pinching, and she had to be closer to a doctor."

The testimony of Mr. Clarence Petersen who lived in apartment No. 1 for several months during the heating season of 1949-50 is as follows (R. 298, 299):

MR. SAGERS:

"Q. While you were there, did you smell any odors?

A. No.

Q. Did you ever have any trouble with the gas heater?

A. Well, we didn't use the gas up until—we were away. We were out working, and the kids were to school, and they were taken care of with the other people, and we were at work and then we would come at night.

Q. But you were there in the morning?

A. Yes.

Q. And you were there at night?

A. Uh huh.

Q. Did you have the heater on while you were there?

A. We did up to, oh, started in November, when it started to get cold.

Q. And you used the heater from November to the time that you moved is that correct?

A. Yes.

Q. Did you ever get any headaches?

A. No sir.

Q. Did you ever smell any odors?

A. No.

Q. Did the heater ever give you any trouble?

A. No trouble at all."

From the foregoing it is the contention of the respondents that the appellants have failed to show that there has been a loss of rental as they have not produced one single witness or deduced any testimony that gives any indication that any of the tenants moved on account of heater trouble.

It would appear that this action was brought solely to get out of paying the balance of $491.75 due on the contract. The court during the respondents' motion to dismiss stated as follows (R. 114, 115):

THE COURT:

"Q. Mr. Bayle, have you paid this down to a sum less than the amount you are praying for here?

A. We have paid it down to about that sum, Your Honor, well, no, we got damages in ad-

dition for rentals, of course, loss of rentals; but as to the price of the heaters, we have down below what we claim the price of the heaters cost."

This is definitely refuted in the fact that in the appellants' complaint and brief they seek recovery of $336.00 (R. 3, appellants' brief page 14) for the heaters, yet, the analysis made of Exhibit 6 & 7, supra, shows the cost of the heaters to be only $206.60 including tax. Furthermore, appellants stipulated to such at the pre-trial (R. 22-25) and again in direct testimony (R. 125, 126) by stating that $983.50 had been paid since the contract was made which in turn would leave a balance of $491.75 which is considerably more than contended by the appellants under any circumstances.

Turning our attention now to the question of warranties in the law of sales as applied to the case at bar. The respondents contend that the appellants are in no position to complain as the respondents were not properly notified of such a breach of warranty, even if such were the case. We believe the instant case comes squarely within the provision of Section 81-3-9, Utah Code Annotated, 1943, which was called to the court's attention (R. 112) and which provides:

"* * * But if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know, of such breach, the seller shall not be liable therefor."

In the instant case the appellants never complained to the respondents until November 1949 (R. 309) and the respondents have only been over to the appellants' apartments three times to service the heaters in all the time they have been installed as is evidenced by testimony of the respondents and their agents (R. 250, 253, 255, 258, 276, 302, 309, 311), once in October 1949 and twice in November 1950 which is almost a year after the appellants had breached their contract by selling the heaters to the Andersons (R. 302, 303). However, the respondents do not rely solely upon the above cited statute but in addition and in the main contend that what little inconvenience, if any, was caused not due to the heaters at all, but due to the improper venting and installation of the flues made by Mr. Finlayson himself, which, of course, the respondents had no control over whatsoever. This is borne out by the testimony of Mr. Haws who installed the heaters for the respondents (R. 270 to 293 incl).

MR. SAGERS: (more specifically beginning at page 272):

"Q. How many elbows were there there?

A. There's one, two, three, and the one where it hits—goes up in the vertical could be classed as four ninety-degree turns.

Q. Is the efficiency cut down by the number of elbows: I mean for every elbow does that cut down the efficiency of your draft?

A. For every ninety-degree L, that's equal to

three feet of pipe, according to the gas company code. That's in flues or fuel lines.

Q. Now, in reference to this particular installation, did you have any discussion with reference to this installation with Mr. Finlayson at the time before they were installed?

A. Yes, when Mr. Christopherson called me over to see if he should go ahead with it the way it was requested I told Mr. Finlayson I didn't think the gas company would approve it if it was put in that way, but it was insisted that it be put in that way and I put it in that way.

Q. Now, did you notice anything else in the installation of the equipment which Mr. Finlayson had put in?

A. Yes, the fuel lines. Coming from the front of this house, there's four meters underneath the porch. Each apartment is on its own meter. Two of those fuel lines run through this partition here coming along. It would be on the floor of the upstairs apartments and on the ceiling of the downstairs apartments, if you follow me, coming along these two lines, one for upstairs and one for downstairs. Those lines were in with thread connections, and they were plastered in and concealed, which according to my information is not according to gas company code to have a concealed fitting, a threaded fitting plastered in. If they are going to be concealed, they must be welded.

Q. I show you Mr. Haws, a book marked "Rules and Regulations for Gas Piping and Installation" put out by the Mountain Fuel Sup-

ply Company. Are these the codes that you follow in installing?

A. At that time, yes. I think since then they have revised some of their code and put out, but that was the book in force at the time of installation.

Q. At the time you went over there, you had a conversation—did you have a conversation with Mr. Finlayson in reference to the installation?

A. Yes.

Q. What was said?

A. Well, we wanted to find out where these appliances went, for one thing. I wanted to bring this flue straight through the wall and put the heater on the flue. For instance, if we could have gone straight through like that, there would have been no cause for all these L's and turns, causing loss of gas flow.

Q. In other words, if you had gone straight through as you wanted to, would you have cut out any L's?

A. About three.

Q. And the more L's you have does that cut down the efficiency?

A. Right.

Q. If you had gone straight in, would the draft have been better?

A. Couldn't have helped but been better.

Q. And that's what you wanted to do?

A. That's right. There is one other thing here.

This five-inch flue, according to the gas company code, does not carry the cross section area enough to carry two four-inch pipes going into it. The code reads, if I may state, the vertical shall be the full cross section area of the largest pipe entering it from the horizontal plane plus three-fourths the area of second pipe. Now, I don't know if the jury wants to figure out the cross sectional areas of these pipes * * *

A. * * * but they are two inches shy in cross sectional area of being adequate.

Q. Mr. Haws, if you had installed these straight in, there would have been a better draft, and in your opinion do you think they would have worked properly?

A. I think they would have worked properly because since that time we have had to modify the flue after all these other said changes that you have heard about; and looking at the same furnace from face view of it—I call it a furnace; it's a space heater —going off the back of this diverter, it comes across here with a slight upgrade and went in. Now, I have went over, and from this point here where it comes out the diverter up to here, there is a thirty-inch length of pipe, also eliminating this T here. I cut a hole through the wall and tin snipped into the inside pipe and made a tight joint there and have raised that flue in the two upstairs apartments. The two heaters in the basement are still identical on their installation.

Q. But at the time you installed them you wanted to do that to begin with, is that correct, to run them straight in?

A. I wanted to go straight in by moving the heater over here. This raise here helped on the draft after * * *

Q. When was that done?

A. I think it was November or December of last year. This is the last time I have been over there as far as doing anything with the heaters is concerned.

Q. How many times have you been over there with the heaters?

A. Well, since they were installed I think I have had occasion to be over there three times.

Q. At the time you took them in there in October and November of 1949, I mean took them out for welding, at whose suggestion did you take them out?

A. It was somebody from the gas company, I wouldn't modify factory specifications on any piece of equipment without an okey from someone in authority.

Q. How long did you have them out?

A. As I recall, I took two of them out. It took me four hours apiece on each heater to make these four welds on each heater. They were out and in the same day. It was two days involved."

This is borne out by Mr. Brady's testimony (R. 310) and Mr. Lloyd's who was a tenant at the time (R. 297).

"Q. Two out one day and two out the next day?

A. That's right.

Q. And put them back in. What was the * * * you changed the factory specification?

A. There was no specifications changed at that time * * * no, the gas company's contention was that this wasn't a welded connection there. That was a pressed steel connection.

Q. Now, are all of the Brilliant Fire heaters just pressed steel?

A. All that I have seen.

Q. Have you ever had occasion to weld any others?

A. No.

Q. Okey, go on.

A. Now, that was where the weld was made, right there. So you see there was nothing changed on specifications outside of maybe improving the connection; so that there would be—there was absolutely no possibility of a gas leak at that point.

Q. Now, in reference to these heaters, Mr. Haws, what is the most common cause of spillage or odor from a heater?

A. Bad venting."

Without quoting Mr. Haws any further it will be noted from his testimony that the other eight pieces of equipment installed were not vented (R. 278, 279, 280). Furthermore, the ones that are vented—the heaters—are done improperly and the appellants would not permit the respondents to change them (R. 272, 289, 304, 311).

If there was a breach of warranty as contended by the appellants it would appear that there would have been more visits made to the apartments both by the respondents and the gas company. Other than the time the heaters were taken out in November 1949 and in October 1950 (R. 250, 253, 255, 258, 276, 309, 311), the respondents did not make any visits to the apartments and both of these visits as shown above, were due to the faulty installation of the appellants and not the respondents. The gas company other than making a suggestion to weld the collars in October 1949 did not make a call in connection with the heaters until May 9, 1950 which is two years after they were installed and at the close of the first heating season, then this call was only to light the pilot light that had gone out in Apartment No. 2 (Exhibit 3). No further calls were made by anyone until September 1950. Mr. Tranter in his testimony pointed out that the gas company makes a service order call slip out every time they are called (R. 208) and a close analysis of Exhibit 3 reveals that from the time the heaters and other equipment were installed on December 31, 1948 (R. 127, 253) until the time of the trial, April 11, 1951, which would certainly be stating things most favorable to the appellants as this would be way past the warranty period, there have been only 25 service calls for all four apartments and all 13 pieces of gas equipment. The record also shows that quite a few of these 25 calls were for lighting pilot lights and other pieces of equipment rather than the heaters. Further analysis will show that there has

been only an average of 2-4 calls concerning each heater in two and one-third years so if there had been anything drastically wrong there would have been more service calls. As specifically stated by the respondents the heaters are only guaranteed one heating season. Mr. Haws testimony shows that he has installed at least 64 similar heaters and never had any trouble whatsoever (R. 283), the heaters are American Gas Association approved (R. 219), and are made by a company that has been in the stove business 105 years (R. 263), one of the respondents has even installed similar type heaters in his mother's and brother's homes (R. 256), therefore we submit the heaters were not defective.

We believe that the case at bar comes directly within section 81-5-7 (3), Utah Code Annotated, 1943, which is as follows:

> "Where the goods have been delivered to the buyer he cannot rescind the sale, if he knew of the breach of warranty when he accepted the goods, or if he fails to notify the seller within a reasonable time of the election to rescind, or if he fails to return or to offer to return the goods to the seller in substantially as good condition as they were in at the time the property was transferred to the buyer * * *."

Such is the case here as the evidence adduced and pointed out above directly show that the heaters are not defective, improper notice has been given, and at no time have the appellants offered to return said heaters to the respondents, or have they sought to have them replaced, but have continued to use the heaters

all the time (R. 254). It is well settled law in Utah that a purchaser of personal property waives or loses his right to rescind the contract for fraud, breach of warranty, or failure of the article purchased to conform to the contract, if he uses it in his business or otherwise as his own property, for his own benefit or convenience, and not merely for testing or preserving it, after he has knowledge of the ground for recission. This doctrine is followed in the following cases:

Detroit Heating and Lighting Co. vs. Stevens, 16 Utah 177;

Summers vs. Provo Foundry and Machine Co., 53 Utah 320;

Advance Rumely Thresher Co. vs. Stohl, 85 Utah 124, which was confirmed by 173 Fed. 834—The Venezuela;

Black on Rescission and Cancellation, 2nd Ed., Section 599.

The above is supported by the evidence in that when the respondents brought their action to replevy the goods the appellants very quickly filed their bond to permit them to retain the goods. If they had been so bad and not fit for the purpose, etc. why didn't they permit the respondents to repossess as they had not paid down to within twice the value of the heaters?

It is also well settled law that an action for damages for breach of warranty will not lie until the title to the property has passed and in this case title has never passed as by the terms of the conditional sale contract (Exhibit B) title was to remain in the respond-

ent until all payments are made and there is still a balance due on the contract of $491.75 (R. 22-25, 125, 216, Exhibits 5 and 7). The appellant breached the contract by selling it to the Andersons on December 21, 1949 (R. 302) without authority and the new purchasers were even lead to believe that the heaters were paid for (R. 302).

Here the appellants could have continued their payments until title passed, and then brought their action to recover in damages the difference between the price agreed to be paid and the actual value, including compensation for loss incurred in their so-called effort in good faith to use the heaters in compliance with the warranty; or they could have promptly returned the property upon discovering the "so-called defect" and recovered the consideration paid, or tendered the return of the property on condition that the respondents return the payments received and the appellants have not done any of these, therefore, were not even entitled to be in court. This is evidenced by:

130 A.L.R. 755 and annotations;
47 American Jurisprudence, Sec. 887, page 94.

Where parties have produced all their evidence, and the court has received it, and they have rested their case at the trial, they have thereby admitted, and in that way estopped themselves from denying, that they can do no more to overcome the objection that the evidence is insufficient to sustain a verdict in their favor, because the question of the sufficiency of the evidence always

arises in every case before its submission to a jury, and it is the province and duty of the court to determine it. 53 American Jurisprudence, Para. 340, Page 273.

Where the evidence is conflicting and the court is asked to direct a verdict, or on its own motion considers the direction of a verdict, all facts and inferences in conflict with the evidence against which the action is to be taken must be eliminated entirely from consideration and totally disregarded, leaving for consideration that evidence only which is favorable to the party against whom the motion is leveled. 53 American Jurisprudence, Para. 350, Page 282.

The presence or absence of conflicting testimony in a cause is a consideration by which the courts are governed in directing verdicts. Where the material issues or controlling facts are conceded, or the proof offered to establish them is undisputed, uncontradicted, or uncontroverted, or such facts are conclusively established, or established beyond dispute, or the evidence is all one way, and is unconflicting and uncontradictory, and only one legitimate inference may be drawn, and there are no circumstances which tend to impair or impeach it, and it is not susceptible of inherent weaknesses, improbabilities, and incongruities which in and of themselves naturally arise to contradict or impeach the weight and credibility of the utterances of the witnesses, the only question being one of law, the court may, should, and must, direct a verdict. 53 American Jurisprudence, Para. 358, Pages 287 and 288.

As has been said, credibility, either one way or the other, should make no difference in the operation of the fundamental principle which necessarily underlies the direction of verdicts in all cases. The question whether reasonable minds could arrive by reasoning processes at more than one opinion or conclusion is always a question for the trial judge. 53 American Jurisprudence, Para. 363, Page 291.

The court's attention is respectfully invited to *Fonville* vs. *Wichita State Bank and Trust Co.,* 33 A.L.R. 125, 161 Arkansas 93, 255 S.W. 561, wherein the court states:

> "The court should direct a verdict where there is no evidence sufficient to justify submission of the case to the jury."

The court in *Rosenfield* vs. *United States Trust Company,* 122 A.L.R. 1210, 290 Mass. 210, 195 N.E. 323 states:

> "A party is not entitled to the submission of the case to the jury where the evidence is insufficient to warrant a finding in his favor."

The California court in *California Packing Corp.* vs. *Lopez,* 64 A.L.R. 1412, 207 Cal. 600, 279 P. 664, states:

> "The court has the right to direct a verdict only when, disregarding conflicting evidence, and giving opposing evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn therefrom, the result is a determination that there is no evi-

dence of sufficient substantiality which would support a verdict contrary to the one directed, if given."

The above view is supported in *Walters* vs. *Bank of America National Trust and Savings Association* in 110 A.L.R. 1259, 9 Cal. 2d 46, 69 P. 2nd 839.

Applying these principles to the instant case and viewing the evidence in the light most favorable to the plaintiffs-appellants, we respectfully submit that the trial court rightfully concluded that the plaintiffs-appellants had failed in their burden of proof to show by a preponderance of the evidence that there existed any breach of warranty insofar as the heaters were concerned and that they had also failed to show any loss of rental. This is easily substantiated by the view of the court in its remarks at the conclusion of the trial and at the time it directed a verdict in favor of the defendants wherein the court said:

> "Well, in view of the evidence there still isn't, I think, anything for the jury to fuss about. You have listened patiently and long, and these parties have a burden to show by a preponderance of the evidence their various propositions, and I have gone through them pretty thoroughly, and in my mind burdens have not been established except where they have been established and it's so well established that there is no need for argument about the thing." (R. 327)
>
> "Ninth, did the plaintiff lose rental by reason of improper installation of the equipment described in this complaint or by reason of a

defective condition of the equipment? Well, I don't think there is any evidence that you could say he did. He says he lost rental, but all the evidence is he came down here and his apartments were vacant, and sometime later he rented them. Can you or I say those tenants moved out because of leaking gas? He didn't bring any of the tenants here, and they were out when he got here, so there isn't any evidence you can find that, or there isn't anything for you to dispute about it.

"If he did lose rentals, what was the amount? Well, he hasn't proved there was any loss, so you can't tell that." (R. 329)

In view of the foregoing comments it was overwhelmingly apparent from the evidence adduced at the trial that the court was more than justified in directing a verdict in favor of the defendants and that there was nothing for the jury to act upon and the court would have erred in ruling otherwise than it did.

POINT II

The appellants in their brief, page 15, state that they had exhausted all patience before they brought this suit. It would appear from the evidence adduced and the foregoing arguments presented by the respondents in argument No. 1 that the facts show quite the contrary. The appellants have repeatedly breached the contract as they did not adhere to their promise to pay cash within 90 days; secondly, they would not sign the

valid conditional sale contract (Exhibit B) until March 1949; thirdly, they have been delinquent in not one but every single payment that was due since the contract was signed. The appellants have stated in their brief, page 15, that Owen Despain, Assistant Cashier of Sandy City Bank asserted that the only period during which the plaintiffs were delinquent in their payments under the contract were when they had been granted a deferment. We invite the court to search Mr. Despain's testimony as the respondents have found quite to the contrary as follows (R. 234):

MR. SAGERS:

"Q. Well, you can delete that, yes, that's all right. Take from then on if they were deferred to July 17, then from July, was the July and August payments paid on time and so on down the line?

A. As I would interpret this record, there were no payments that were paid.

Q. No payments paid on time. Is that right?

A. On exact date."

The appellants complain that they had the payments deferred until July 17, 1949 (R. 226, 234) yet, on the other hand, state the heaters were not connected until September 1949 (appellants brief, page 6, R. 128). In analyzing this we are at a loss to see how the appellants could expect to blame the deferral of payments and non-payment of payments to the "so-called defective heaters" when the heaters were not even operating at that

time as shown by their own testimony. The court's attention is respectfully invited to Exhibit 4 which are samples of the bank's delinquent notices (R. 229-230) and Exhibit 5 which is the bank's official payment record (R. 230). A close analysis of these two exhibits as well as of Mr. Despain's testimony (R. 225-236) will speak for themselves.

To further show that it was the appellants who breached the contract and not the respondents, we wish to point out that the equipment was sold to the Andersons (appellant's brief, page 6, R. 164, 302) without authority or permission which is in direct violation of paragraph 3 of Exhibit B.

The appellants complain further in their brief, page 15, that the respondents brought a separate action in replevin. The court's attention is invited to the pretrial order (R. 22-25) wherein the court consolidated the two actions and denied the respondents the cost of filing their action. It will also be noted from the Memorandum and Cost sheet (R. 50, 51) that this pretrial order was adhered to, therefore there is no reason for complaint. All the court awarded the respondents was the balance due, which they were rightfully entitled to under any circumstances, on the contract of $491.75, interest, and attorney's fees which were all provided for by the contract (Exhibit B). The respondents were denied damages for the refrigerator which amounted to the full amount of $185.75 as they have been unable to sell it since replacing it for the appellants.

The respondents invite the court to place themselves in the position of the respondents who had continually permitted the appellants to violate the contract without taking any legal steps as they didn't want to be involved in litigation (R. 258) and have not so been involved in all six years of operation (R. 238), but when the appellants saw fit to involve the respondents in litigation, which is as shown by the evidence merely a subterfuge to try and get out of paying the balance due on the contract, the respondents felt it high time to seek recovery by repossession proceedings. It is more than evident that it was the respondents who repeatedly extended the olive branch rather than the appellants.

In the light of the evidence adduced, we respectfully conclude that the trial court was certainly not in error in entering judgment on the contract and in awarding attorney's fees to the defendants as provided for by Exhibit B.

POINT III

The appellants in their brief, page 16 and 17, complain that the trial court erroneously entered findings of fact and conclusions of law and judgment and the court exceeded its authority by having the clerk of the court sign the verdict and judgment nunc pro tunc. The respondents admit that findings and conclusions and judgment by the court were entered in error but also submit that by such entry they did not deprive

ıe appellants of any rights and therefore such entry 'as merely superfluous. However, on the other hand 're invite the court's attention to Rule 60 (a) Utah tules of Civil Procedure, which permits the correction f such mistakes and is as follows:

> "(a) Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders * * *."

The respondents position being that the above entry was a mistake and a clerical error only and certainly did not prejudice the appellants in any respect. Although we have no Code provision on this matter, our court has recognized the inherent right of a court to enter a judgment nunc pro tunc to correct such errors. In this respect please be referred to the following:

> Frost vs. District Court, 96 Utah 106, 83 P. (2d) 737, on rehearing, 96 Utah 115, 85 P. (2d) 601;
>
> 126 A.L.R. (annotation on page 956) 949;
>
> In re Remick's Estate (California), 170 P. (2d) 96.

The respondents contend that the signing of the verdict by the clerk and the signing of the jury foreman's name are mere ministerial acts and therefore certainly within the purview of the court's discretion-

ary power to order them to be done. The clerk acts as the court directs and therefore the clerk's duties in this respect are ministerial. Furthermore, the rendition of the verdict by the jury as directed by the court is a mere formality, the decision in effect being one of law by the court. 53 American Jurisprudence, Para. 353, Page 283. We are of the opinion that if the foreman of the jury refuses to sign his name to the verdict as directed by the court the court could place the jury foreman in contempt for such refusal. Therefore, in the court ordering the clerk to enter the nunc pro tunc order it was merely doing "now for then" what could have and should have been done at the close of the trial, thus there was no abuse of the court's authority, the judgment was not altered, was valid, and the appellants not prejudiced.

The appellants in citing Title 104-30-8, Utah Code Annotated, 1943 were in error as this section of the code was abrogated by Rule 58A of the U.R.C.P. which became effective January 1, 1950 and therefore is the only rule in force. However, as this new rule is similar in import to the above statute and the court was within its proper bounds the appellants have no cause to complain.

Viewing the circumstances in the light most favorable to the plaintiffs-appellants and assuming Rule 58A (a) to be identical with 104-30-8, U.C.A. 1943, the court was still acting within its power to enter nunc pro tunc orders and the signing of the verdict and the

judgment on the verdict were mere formalities. The court in having the clerk sign the judgment the same day the nunc pro tunc order was made would give it the same import as though it was signed on April 12, 1951. If anyone was prejudiced by this order it was the respondents as in the original verdict (R. 331) the respondents were given a lien on the property but the appellants were granted a stay of execution of 30 days, but in the nunc pro tunc order the respondents were not given any lien. This procedure in effect stayed the proceedings, which in turn would not require the judgment to be entered within 24 hours as relied upon by the appellants. However, if the judgment should have been entered in 24 hours as contended by the appellants then they have no cause to complain as their motion for a new trial would not be timely made as it was not made until April 24, 1951 (R. 48) which would be past the deadline of 10 days as permitted by Rule 59 (b) U.R.C.P. The respondents do not rely on this contention but on the nunc pro tunc order, as the court was within its proper rights in entering such.

The appellants contend in their brief, page 17, that a new trial should have been granted on the above point alone. The court's attention is respectfully invited to Rule 61 of U.R.C.P. which states:

> "No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or otherwise

> disturbing a judgment or order unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceedings must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

By the entering of the nunc pro tunc order neither party was hurt as the same order was entered "now for then."

Motions for new trials being limited to statutory grounds only and the appellants failing to show any of the seven grounds for a new trial as granted by Rule 59 of U.R.C.P. and the court certainly not exceeding its authority, very properly denied the motion of the appellants for a new trial.

POINT IV

The respondents being forced into litigation by the appellants, being compelled to bring a replevin action to recover their property because of the repeated violations of the terms of the contract by the appellants, and being put to great expense and trouble to defend this appeal respectfully request that your honorable body award the respondents a reasonable attorney's fee and costs or else remand this case to the trial court in order that it may award such, for the defense of this appeal. A reasonable attorney's fee being $500.00.

CONCLUSION

The evidence adduced even when construed most favorable to the appellants, shows that the appellants failed in their burden to prove any loss of rental, that they failed to show the heaters were defective, that the respondents breached their contract, or that the appellants sustained a breach of warranty. Quite to the contrary the evidence overwhelmingly supports the respondents' position that the appellants repeatedly breached the contract in many respects. Therefore, no other verdict than a directed verdict could be sustained and the lower court's decision should be affirmed by your honorable body.

Respectfully submitted,

VICTOR G. SAGERS,

Attorney for Defendants and Respondents